Proposed Rulemaking -- Clean Water Act
Section 401 Water Quality Certification Program

State Water Resources Control Board

Responses to Public Comments -- I

Initial ("45-day") Comment Period:

April 23, 1999 to June 8, 1999

Abbreviations/Acronyms/Symbols:

§ -	section/part in a statute/regulation
23 CCR -	Title 23, Division 3, Chapter 28, California Code of Regulations
Basin Plan -	Regional Water Quality Control Plan
Caltrans -	California Department of Transportation
CCR -	California Code of Regulations
CEQA -	California Environmental Quality Act
Corps -	United States Army Corps of Engineers
FERC -	Federal Energy Regulatory Commission
MOA -	Memorandum of Agreement
NPDES -	National Pollutant Discharge Elimination System
PH -	public hearing
Regional Board -	Regional Water Quality Control Board
Staff -	State Board Staff
State Board -	State Water Resources Control Board
USC -	United States Code
WDRs -	Waste Discharge Requirements

RESPONSES TO COMMENTS

COMMENTER A.

Affiliation:	Department of Transportation (Caltrans)
Commenter:	J. Steven Borroum
Title:	Chief, Office of Environmental Engineering
Address:	Environmental Program - MS27 1120 N Street, Room 4301 P.O. Box 942874 Sacramento, CA 94274-0001

Written Comments: June 7, 1999 letter (3 pages)

Comment A-1: **A proposed Caltrans/State Board MOA, that would integrate water quality certification into the Caltrans Statewide Storm Water Permit, should be adopted as an "adjunct" to the proposed regulations.**

Response: This suggestion would result in certification (i.e., a discretionary approval action) of all runoff discharges under a general storm water (a type of NPDES) permit for all Caltrans construction activities statewide. The proposed regulations cannot be used to certify individual or classes of activities, thereby bypassing CEQA requirements for discretionary agency actions. Instead, the regulations propose an appropriate mechanism to address this concern--consideration of certification for classes of activities (§ 3861) following a complete application for certification, proper technical review, development and review of appropriately comprehensive CEQA documentation, and appropriate financial compensation to the certifying agency.

Comment A-2: **(Caltrans Comment #1) The Commenter supports the idea of "standard certification" as replacement for intentional (active) waiver of water quality certification. However, the regulations should also address passive waiver, which results when the certifying agency fails or refuses to act within the period allowed by a federal agency for certification.**

Response: Staff acknowledges the Commenter's support of standard certification. Its use in place of an active waiver will preserve opportunities for public participation and protect the State Board's authority to oversee certification decisions made pursuant to delegated authority. However, Staff disagrees with the implication that passive waiver should be a permissible regulatory option. Accordingly, the likelihood of a passive waiver has been reduced by amending the proposed regulations to clarify that certification must be issued or denied before any federal deadline. (See revised § 3859(a).)

Comment A-3: **(Caltrans Comment #2) The Commenter supports the concept of State certification of classes of activities (in proposed § 3861).**

Response: Comment noted.

Comment A-4: **(Caltrans Comment #3) The proposed State regulations should incorporate the 60-day certification process time limit from the federal Clean Water Act program regulations developed by the Corps, which the Commenter implies would apply to all certifications.**

Response: Staff disagrees. The proposed regulations must pertain to any federal license/permit process that may apply. Other federal agencies may and do have different interpretations of what "a reasonable period of time" for a state certification process is (e.g., a full year is granted by FERC regulations [18 CFR § 4.38(f)(7)(ii)]). Furthermore, Corps District Engineers may vary this number at their own discretion from project to project (e.g., 33 CFR § 325.2(b)(1)(ii)).

Comment A-5: **(Caltrans Comment #4) The words/phrases "activity" and "federal agency" should be elaborated on in the proposed regulations, and examples of activities and federal licenses/permits that trigger the need to seek State certification should be included.**

Response: The proposed regulations were purposely intended not to specifically address who or what must seek water quality certification. The need for water quality certification is determined by federal law. It is not in the State's mandate or authority under Clean Water Act section 401 to define in its regulations who must apply with the State for certification or, correspondingly, to turn away applicants for certification. Interpretation of these terms, as recommended, in the proposed State regulations would be immaterial and potentially inaccurate. Instead, the State should be prepared to accept and review requests for water quality certification from any and all applicants.

Comment A-6: **(Related to Comment A-5.) There have been past instances when Caltrans has been asked to secure water quality certification by a Regional Board for an activity where the connection to a federal permit or license appeared (to Caltrans staff) to be "tenuous" (e.g., the "Mill Creek slide soil storage site").**

Response: This comment does not pertain specifically to this rulemaking process. If and when project-specific problems arise, Caltrans representatives are invited to discuss their concerns directly with State Board Certification Program personnel. Please address preliminary inquiries to:

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Chief of the Certification and Loans Unit
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COMMENTER B.

Affiliation: Zentner and Zentner
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Written Comments: June 8, 1999 FAX (2 pages)

Comment B-1: **The mandatory 30-day notification period in section 3835 should apply to all applications, not just incomplete applications.**

Response: Agreed. Notification should occur within 30 days for all applications, as required by the State's Permit Streamlining Act (California Government Code § 65943). The section's title and language have been amended to clarify this requirement (see revised § 3835(c)).

Comment B-2: **"The [proposed] regulations should specify a time limit for processing certification applications and rendering certification decisions."**

Response: The proposed language now confirms that a certification action be taken within the time allowed by federal agency rules (e.g., §§ 3831(e) and 3859(a)). (See also response to Comment A-4.)

Comment B-3: **The proposed regulations should first require that the State agency request an extension of the federal time limit allowed for a certification action, rather than mandate automatic denial of certification without prejudice.**

Response: An extension should be requested, except in cases when applicable statutes and regulations do not allow extensions. Subsections 3835(b), 3836(b), 3836(c), and 3838(c) have been revised accordingly.

Comment B-4: **Please add Zentner and Zentner to the State Board's mailing list for future notices concerning these regulations.**

Response: Staff complied with this request.

COMMENTER C.

Affiliation: Home Builders Association of Northern California
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San Ramon, CA 94583

Written Comments: May 25, 1999 Letter (2 pages)

Responses to Comments -- I

Comment C-1: **The definition of "water quality standards and other pertinent requirements" is overly broad and should, instead, refer only to those provisions the Commenter claims are specifically identified in the Clean Water Act.**

Response: Clean Water Act subsection 401(d) states that a certification must include limitations necessary to assure that the federal license/permit applicant will comply with water quality standards and "with any other appropriate requirement of State law set forth in such certification..." (33 USC § 1341(d)). Subsections 3831(u) and 3831(v) have been revised accordingly.

Comment C-2: **When faced with expiration of the time allowed for certification, the only defensible course of action should be to approve a request for certification, not deny.**

Response: Staff disagrees. (But see response to Comment B-3.) There is no support for the Commenter's conclusions in section 401 or its legislative history. If adopted this comment could invite applicant abuse.[1/] Furthermore, in attempting to satisfy applicants certifying agencies could run the risk of violating federal and State laws by approving projects without adequate technical information or environmental documentation. Such occurrences would invariably tie up the regulatory process, not streamline it.

In short, Staff takes entirely the opposite position--the only lawful and appropriate course under the stated conditions is non-prejudicial denial (with a process in place to allow and encourage speedy correction of application problems and relatively painless re-application).

Comment C-3: **The Commenter supports Staff's intention to delegate limited certification authority to the Regional Boards.**

Response: Comment noted.

1/ For example, to receive certification for a dredge/fill discharge-related project a careless or unscrupulous applicant might only file an incomplete application, withhold supplemental information, or fail to fulfil CEQA requirements while waiting for the relatively brief Federal time limit (e.g., 60 days) to expire.

Comment C-4: **Section 3856 should be amended to specify that if all information is supplied, the application will be deemed complete.**

Response: Rather than section 3856, Staff has revised section 3831 to address this comment.

Comment C-5: **The standard for issuing water quality certification should be based on what the Commenter claims is "reasonable assurance" language from the Clean Water Act, rather than the "if it is clear that" standard.**

Response: This recommendation lacks merit. First, "if it is clear that" is not new language. It is retained from current regulations, and applies specifically to any decision to issue a standard certification, not to certification in general (compare §§ 3859(a) with (b)). Because standard certification is a streamlined regulatory process, a more cautious standard is both appropriate and warranted.

Second, contrary to the Commenter's assertion, Clean Water Act section 401 does not establish a "reasonable assurance" standard for issuing certification. The language used in the federal statute is that any resulting discharge "will comply" with water quality standards (33 USC § 1341(a)(1)), and that certification must be crafted so that the applicant for a federal license/permit "will comply" with water quality standards and with any other requirements of state law (33 USC § 1341(d)). Instead, the phrase "reasonable assurance" is used in section 401 when describing two possible subsequent scenarios that can occur only after certification has been issued.

Prompted by this analysis, subsections 3831(u) and 3859(b) have been further amended to make this more clear.

Comment C-6: **Only a certification applicant or Regional Board should be able to be an "aggrieved person" in the appeal process.**

Response: This suggestion must be rejected. A primary goal of these proposed regulations is to delegate certification authority to the Regional Boards while retaining the review (petition) function at the State Board. Allowing any aggrieved person to petition helps assure that important issues are brought to the attention of the State Board, while furthering the public participation goals of the federal Clean Water Act.

The phrase "aggrieved person" is taken directly from the Porter-Cologne Water Quality Control Act (California Water Code § 13320(a)), and is similarly used in regulations for petitions in other water quality regulatory programs (e.g., 23 CCR § 2050). It is clear that the California Legislature intended that the State Board receive petitions from any aggrieved person. Since a Regional Board would rarely, if ever, petition to have its own determination reviewed, the Commenter is in effect asking that aggrieved parties be limited solely to applicants. He provides no reason for such a narrow interpretation, and Staff cannot furnish a legitimate one. Staff declines to risk unintentionally limiting this phrase by adding any (unnecessary) definition. Please note that the proposed regulations require that a petition must contain "the manner in which the petitioner is aggrieved;" (23 CCR § 3867(d)(5) [proposed]). This, among other requirements, will allow the State Board to determine the merits of individual petitions on a case-by-case basis, as is the existing practice for all petitions to the State Board.

Comment C-7: **If the petition process to the State Board is to allow aggrieved persons besides applicants, they should be required to have exhausted their administrative remedies by having expressed their concerns in a Regional Board hearing first, before being allowed to petition to the State Board.**

Response: Exhaustion of administrative remedies should not be an absolute requirement. However, an aggrieved person should demonstrate participation in the decision-making process, if such was possible, or indicate the reason for not doing so. Appropriate language has been added to proposed section 3867(d).

COMMENTER D.

Affiliation:	Washburn Briscoe & McCarthy
Commenter:	James P. Corn
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Written Comments:	June 4, 1999 Letter (3 pages) June 4, 1999 FAX (4 pages)

Comment D-1: **The Commenter objects to the automatic "denial without prejudice" action.**

Response: See response to Comment C-2.

Comment D-2: **Section 3856 should be restructured to indicate that after 30 days, an application will be deemed complete.**

Response: In deference to the Permit Streamlining Act (California Government Code § 65943), section 3835 has been revised to require that all certification applicants be notified within 30 days of the status of their applications (see response to Comment B-1). No further revisions are necessary.

Comment D-3: **Section 3856 language is insufficient and open-ended with regard to what constitutes a complete application.**

Response: Staff disagrees. The section 3856 language is necessarily comprehensive, but neither open-ended nor unclear. See language added at the end of section 3856.

Comment D-4: **Subsection 3856(h)(6), that appears to require an "alternatives analysis," should be removed.**

Response: First, this language does not require that alternative (mitigative) steps be taken, only that they be reported, if taken. Second, it will help speed the regulatory process by ensuring that applicants are quickly credited for conscientious project design. Third, it is necessary to help maintain the accuracy and utility of the State Board's certification data base.

Comment D-5: **The term "aggrieved person" should be limited to persons having previously attempted to influence the decision-making process in question.**

Response: See response to Comment C-7.

Comment D-6: **The proposed regulations should rely on what the Commenter claims is a "reasonable assurance" standard established in the Clean Water Act.**

Response: See response to Comment C-5.

Comment D-7: **The phrase "other pertinent requirements..." in proposed section 3859(b) should be removed or defined.**

Response: Staff disagrees. (But see also response to Comment C-1.) The Clean Water Act requires that every water quality certification include limitations to ensure that applicants comply with water quality standards "...and with any other appropriate requirement of State law set forth in such certification..." (33 USC § 1341(d)). This language is clear and unambiguous. It also indicates that appropriate requirements of State law will be established on a certification-by-certification basis.

Comment D-8: **The current maximum certification fee in section 3833 should be retained.**

Response: The issue is somewhat immaterial, since this language was primarily intended for other forms of certification and most, if not all, conceivable projects seeking water quality certification now have and will have applicable fees. Regardless, Staff believes that the revision is necessary and appropriate to adequately reimburse the State for effort to issue any type of certification.

COMMENTER E.

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Written Comments: June 7, 1999 Letter (5 pages)

Comment E-1: **Language should be added to section 3833 to require the certifying agencies to maintain a record-keeping account of all expenditures incurred relative to the processing of the 401 certification.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the proposed regulations.

Proposed FERC-related certification fees are patterned after application fees for small hydroelectric projects imposed under existing State regulations (23 CCR § 677). These regulations do not specify a specific accounting and billing system. The State Board established an internal accounting/ billing system (based on individual Program Cost Account numbers for each project) to process those fees, and will use it to handle all proposed FERC-related certification fees. Accounting/billing information will be available to the applicant. No additional requirement is needed in the proposed regulations.

Unfortunately, such an accounting process is not practical for certification of dredge/ fill-related projects. Federal agency rules normally allow too little time to permit project-by-project accounting for certification of such projects. Therefore, the current and proposed regulations rely on a one-time, impact-based fee schedule for these types of projects.

Comment E-2: **The proposed regulations should distinguish between significant licensing and relicensing activities, and other, minor activities such as maintenance activities.**

Response: With respect to activities that do not require a new FERC license, license renewal, or license amendment, see response to Comment S-8. Concerning activities that require a new, renewed, or amended FERC license, it is unnecessary to develop differing fee categories based on the level of effort associated with processing an application because the final fee will be based on the costs actually incurred in processing the application for water quality certification (see § 3833(b)(1)). The proposed regulations provide for smaller deposits in cases where it appears a larger deposit will not be necessary, and to the extent the deposit exceeds actual expenditures, the deposit will be refunded to the applicant.

Comment E-3: **The State Board should determine the likely extent of the project/fees required early in the application process and request a deposit accordingly.**

Response: It is impossible to estimate costs in the early stages of the application process. The costs will be driven, in part, by the process chosen by the applicant and the corresponding expenditure of State Board staff resources. For example, any pre-filing consultation, participation in a collaborative process, or use of an alternative licensing procedure will likely require additional staff resources beyond that which would be required in the traditional FERC relicensing process. In addition, costs will vary on a project-by-project basis depending on the complexity of the water quality issues.

Comment E-4: **The 30-day time period for submitting a deposit to the State Board is unreasonably short.**

Response: See response to comment K-8.

Comment E-5: **The State Board should deny the application for water quality certification without prejudice if a payment is not received on time.**

Response: Agreed. Subsection 3837(b)(2) addresses this issue.

Comment E-6: **The State should be required to return refunds within 60 days.**

Response: Agreed. The proposed language in subsection 3833(b)(1)(C) has been modified accordingly.

Comment E-7: **The language in subsection 3833(b)(2) is confusing.**

Response: The language has been revised.

Comment E-8: **The definition of a "standard certification" (per §§ 3831 and 3860) is unclear with respect to which subsection 3833(b)(2) fee must be paid.**

Response: Subsection 3833(b)(2) has been revised and should clarify this issue.

Comment E-9: **The Commenter suggests that the notice-fee requirement is a "nuisance fee" and unnecessary.**

Response: Not true. A $60 notification fee is both fair and necessary. Regulation of separate activities allowed under federal general permits can be a significant burden on State resources for several reasons: (a) federal agencies often refuse to pay the certification application fee; (b) even when paid, application fees do not fully compensate the State for all regulatory work necessary to oversee individual projects over the full life of a general permit; (c) the number of projects proceeding under such a permit, and requiring subsequent individual water quality consideration, may be extensive; and (d) review of proposed project notifications may occasionally be time consuming/labor intensive when applicants misuse or misapply a general permit. The reasonable $60 fee will help ensure that the State receives proper compensation for the cost of regulating generally-permitted activities.

Comment E-10: **Revised language is suggested for subsection 3833(b)(4).**

Response: The language has been revised.

Comment E-11: **The fee relationship between WDRs and certification in subsection 3833(b)(5) is questioned: Does the correct fee from subsection 3833(b)(2) depend on whether WDRs are issued? What is the "initial certification fee"?**

Response: The two programs, for WDRs and water quality certification, are intended to be independent and not mutually exclusive in the proposed regulations. A certifying agency would normally make only one regulatory effort in response to an application for certification. On some occasions a certifying agency may need to issue both WDRs and certification concurrently for the same activity. More rarely, initial certification may need to be followed at some later date by regulation under WDRs, perhaps to deal with some new or originally unforeseen issue. The proposed language is intended to help ensure all these possibilities, but also to protect the applicant from an excessive fee burden. The "initial certification fee" refers to the (rare) circumstance when initial certification is followed by subsequent issuance of WDRs for the same project. Please see new revisions to subsection 3833(b)(5).

Comment E-12 **Any initial fee accompanying an application should be applied towards any concurrent WDRs fee.**

Response: Agreed. (See revised language in subsection 3833(b)(5).)

Comment E-13: **Certification applications for minor activities at FERC facilities should continue to be filed at the Regional Boards and not at the State Board.**

Response: With respect to fees for activities that do not require a new FERC license or FERC license amendment, see revisions made in response to comment S-8. In cases where a new, renewed, or amended FERC license is involved, however, review should be by the State Board because of the potential that a certification will, by law, apply to the diversion or use of water that goes beyond the minor activities proposed in the original application.

Comment E-14: **Existing section 3857 language concerning WDRs should not be eliminated.**

Response: The intent was to purposely underscore the independent nature of the two programs. Also, much of the foundation of section 3857 is no longer valid. For example, an assumption inherent to section 3857, that WDRs can effectively regulate any activity seeking water quality certification, is no longer true. Courts have determined that State regulatory authority does not hold for FERC licensing situations (e.g., see *Sayles Hydro Associates* v. *Maughan* (9th Cir. 1993) 985 F.2d 451). Even where State authority would not be preempted, the certifying agencies will often choose to certify instead of issuing WDRs, since the certification process is generally a less cumbersome method of approving projects. Finally, it will no longer be necessary to have the Regional Boards make certification recommendations to the State Board, as is provided in section 3857, since certification authority is to be delegated to the Regional Boards. In short, the process outlined in section 3857 is no longer relevant, and should be eliminated. (See also response to Comment E-11.)

Comment E-15: **All water quality certification language should be placed in one article within Chapter 28 of Title 23.**

Response: Staff disagrees. Any specific editorial gains would be lost due to the necessary overall increase in the size of Chapter 28. (For example, the petition process language would have to be repeated for each type of certification.)

Comment E-16: **The regulations should address certification for regional (general) federal permits.**

Response: See response to Comment A-1.

COMMENTER F.

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Office of the General Counsel
Commenter: Leslie A. Dunsworth
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Sacramento, CA 95852-1830

Responses to Comments -- I

Written Comments: June 7, 1999 Letter (9 pages)
June 8, 1999 FAX (10 pages)

Comment F-1: **There is no real cost cap on FERC-related certification fees.**

Response: True. Water Code section 13160.1, which authorizes fees for water quality certification, allows recovery of the entire cost of giving a certificate and does not impose a cap on fees. The regulations as proposed limit the fee for a project to the State Board's actual costs incurred in processing the application.

Comment F-2: **There is no definition of "reasonable costs," or delineation of cost categories that will be covered by the fees. The applicant should not be expected to pay for costs unrelated to study and review of applications, general agency overhead, travel, litigation costs, or the cost of State Board participation in FERC licensing proceedings.**

Response: The proposed fees are based on the reasonable costs of processing an application. Costs the Commenter seeks to exclude are either clearly inside or clearly outside of the scope of the proposed fees. For example, there is no basis for excluding from application fees travel costs associated with site inspection during application review. The certifying agencies are authorized to include in fees not only the direct cost of employee salaries, but also a *pro rata* share of indirect costs or "overhead," such as administrative costs and benefits (see California Government Code § 11010; see also response to Comment K-5). In contrast, the costs of defending a certification decision in court and in proceedings before FERC should not be included in a fee. Proposed subsections 3833(b) and 3833(b)(1)(D) have been revised to address these issues. (See also response to Comment F-27 (II) regarding reasonable costs.)

Comment F-3: **The proposed regulations should distinguish between significant licensing and relicensing activities, and other, minor activities such as maintenance activities.**

Response: See response to Comment E-2.

Comment F-4: **Language should be added to section 3833 to require the certifying agencies to maintain a record-keeping account of all expenditures incurred relative to the processing of the 401 certification.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

Comment F-5: **The automatic issuance of denial without prejudice runs contrary to the Clean Water Act's one-year time limit to issue certification.**

Response: See response to Comment C-2.

Comment F-6: **Fee forgiveness should be offered to applicants who voluntarily withdraw defective, and re-submit corrected, applications.**

Response: Agreed. Subsection 3833(b)(4) has been revised accordingly.

Comment F-7: **The reference in subsection 3837(b)(1) to certification conditions "that the applicant and federal agency are willing to accept and implement" could lead to denial of certification simply because the applicant seeks judicial review of a condition of certification.**

Response: While the Commenter's fears are probably groundless, the language in question is unnecessary, and has been eliminated.

Comment F-8: **The Commenter objects, as overly broad, to a proposed requirement for copies to be supplied of applicant-federal agency correspondence.**

Response: Subsection 3856(d)(3) would only apply if copies of the federal license/permit application or any federal notification were otherwise unavailable. Such circumstances, though rare, require that a certifying agency have access to any valid sources of information about the proposed project. Regardless, subsection 3856(d) has been revised to reduce confusion.

Comment F-9: **The Commenter objects to a "shotgun" approach used which requires that applications include proprietary and market-sensitive information on other projects planned during the previous and subsequent five year periods.**

Response: On the contrary, the proposed requirement is both administratively and legally justified. (See also Comment L-4.) Under CEQA, agencies must evaluate projects for potential "significant effect on the environment", which may occur if:

> *The possible effects of a project are individually limited but cumulatively considerable. As used in this subdivision, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.* (California Public Resources Code § 21083(b))

This language requires that the project applicants be asked to reveal, if known, their plans for future activities that may impact the same water body.

Other commenters criticize this requirement as redundant because CEQA documents should already include the information. Although materials in a complete application need not be duplicative, CEQA documents in the application package may not supply the needed information. Also, some projects are exempt from CEQA requirements, but the State Board would still need to consider cumulative impacts to determine compliance with water quality standards. Furthermore, agencies must accept applications for processing without final CEQA documentation (Government Code § 65941), so certification staff are sometimes required to initiate a critical application process and technical review without access to CEQA documentation.

Comment F-10: **The Commenter supports the option of holding a public hearing (proposed section 3858(b)).**

Response: Comment noted.

Comment F-11: **The proposed regulations may require insertion of conditions into certifications that are unrelated to water quality and proposed by other federal or State agencies.**

Response: Insofar as the State is required to address in its certifications other appropriate requirements of State law, true. First, however, the Commenter apparently has misread the proposed language. The first sentence of subsection 3859(a) states only that the certifying agency shall review other agency recommendations concerning the proposed project. This seems, to Staff, to be immanently reasonable and logical. There is no requirement that a certification must adopt another agency's suggestions.

Concerning the definition of "water quality standards...," and the clear mandate to address other appropriate requirements of State law in certification, see responses to Comments C-1 and D-7.

Comment F-12: **The term "aggrieved person" should be defined and limited in scope.**

Response: See responses to Comments C-6 and C-7.

Comment F-13: **Reconsideration of a Regional Board action by the State Board removes the "finality" of a Regional Board action, and undermines the delegation of certification authority proposed in the regulations.**

Response: The California legislature clearly intended that Regional Board regulatory actions be able to be reviewed by the State Board on its own motion (see California Water Code § 13320(a)). Existing water quality regulations further validate this view (see 23 CCR § 2055.)

However, allowing unlimited time for reconsideration would defeat the concept of finality for these decisions. Prompted by this comment, the proposed regulations will now limit the effect of any reconsideration taken 30 days or more after the original certification action to projects federally approved after the reconsideration process (see § 3867(b)(2) [proposed]).

Comment F-14: **The proposed regulations should limit the number of amendments possible to a petition and the time period within which a petition can be amended.**

Response: The proposed regulations were modeled after existing regulations (i.e., 23 CCR § 2050 et seq.) regarding petitions for review other Regional Board actions. As such, they provide that in the event that a petition is incomplete, the petitioner is normally given one opportunity to correct it, unless there is good cause for an extension of time. There is no evidence that this process has been a source of abuse or delay.

Verbal Comments: June 8, 1999 Public Hearing
Commenter: Leslie Dunsworth

PH Comment F-15: **(Same as Comment F-1.) There is no real cost cap on FERC-related certification fees.**

Response: See response to Comment F-1.

PH Comment F-16: **(Same as Comment F-2.) There is no definition of "reasonable costs," or delineation of cost categories that will be covered by the fees.**

Response: See response to Comment F-2.

PH Comment F-17: **(Same as Comment F-3.) The proposed regulations should distinguish between significant licensing and relicensing activities, and other, minor activities such as maintenance activities.**

Response: See response to Comment E-2.

PH Comment F-18: **(Same as Comment F-4.) Language should be added to section 3833 to require the certifying agencies to maintain a record-keeping account of all expenditures incurred relative to the processing of the 401 certification.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

PH Comment F-19: **(Included within Comment F-2.) Certain types of program charges should not be paid for by applicant fees.**

Response: See responses to Comments E-1 and F-2.

PH Comment F-20: **(Same as Comment F-6.) Fee forgiveness should be offered to applicants who voluntarily withdraw defective, and re-submit corrected, applications.**

Response: See response to Comment F-6.

PH Comment F-21: **(Same as Comment F-8.) Section 3856, the complete application requirements, will result in applicants supplying copies of more correspondence than the certifying agencies will actually want.**

Response: See response to Comment F-8.

PH Comment F-22: **(Same as Comment F-12.) The term "aggrieved person" should be defined and limited in scope.**

Response: See responses to Comments C-6 and C-7.

COMMENTER G.

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South Pacific Division, Corps of Engineers
Commenter: Peter T. Madsen
Title: Colonel (P), Engineer/Division Commander
Address: 333 Market Street, Room 923
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Written Comments: June 8, 1999 FAX (from Daniel J. Dykstra, Jr.) (6 pages)

Comment G-1: **The proposed regulations should use the federal definition of "emergency" and include an expedited procedure for certification of emergency activities.**

Response: Specific language for certification of emergencies is unnecessary, and may be ill-advised, since emergency certification can be issued rapidly under the proposed regulations.

To elaborate, three primary factors may influence the time

taken to certify emergency activities: (a) public notice, (b) CEQA, and (c) time allowed for certification by federal agency rules. The proposed regulations already exclude emergency certification from the 21-day public notice requirement. Valid emergency activities are normally exempt from CEQA. Finally, shortened federal time limits would actually contribute to rapid State certification action.

In conclusion, although the current language lacks a specific mechanism for emergency certification, none is needed. Certifying agency staff will be able and encouraged (through staff training and program guidance) to take action rapidly for all valid emergency situations. Inclusion of a State definition for "emergency," that undoubtedly would be the current CEQA definition, would add nothing to the process, and might, under certain circumstances inhibit or delay timely regulatory action.

Comment G-2: **The State regulations should establish specific time limits for taking a certification action.**

Response: See response to Comment A-4.

Comment G-3: **The State regulations should establish a time when the federal period allowed for certification begins.**

Response: The Commenter apparently overlooks the fact that water quality certification is a service provided for more than one federal agency regulatory process, and that these processes are subject to individual and distinct federal agency rules. As a result, it would be difficult and ill-advised for the State to attempt to control when the certification "clock" starts for all potential federal agency processes.

Comment G-4: **The proposed State regulations should address exactly what projects need apply for certification under federal rules.**

Response: See response to Comment A-5.

Comment G-5: **The proposed definition of "activity" appears to encompass projects that are exempt under Clean Water Act section 404, especially "maintenance" and "repair" activities.**

Response: Again, the Commenter appears to forget the potentially broad applicability of the certification program. The Clean Water Act requires any applicant for any activity that may cause a discharge and that requires a federal license/permit to seek certification, not just Corps-permitted activities. A category of activities exempted by one federal agency's rules may not be exempt from all types of federal licenses or permits. Furthermore, Staff's reading of federal regulations (i.e., 33 USC § 1344(f)(1)) indicates that not all potential maintenance and repair/ reconstruction activities are exempted by section 404.

In conclusion, if federal agency rules exempt an activity from the need of a license/permit, the need for certification is also eliminated. Otherwise, the State certifying agencies (and their governing regulations) must be prepared to review a certification application.

Comment G-6: **Subsection 3833(b)(2) is unclear regarding what types of activities need to apply for certification and are eligible for "standard certification" and the special fee.**

Response: Regarding what activities need apply, see response to Comment A-5. With regard to standard certifications and fees, see revised subsection 3833(b)(2).

Comment G-7: **The distinction between subsections 3833(b)(2)(B) and 3833(b)(5), regarding when WDRs, water quality certification, and their respective fees apply, is unclear.**

Response: The issuance of a State water quality permit--i.e., WDRs--in place of or addition to water quality certification is a decision to be made by the certifying agency and will be dictated by project circumstances that will vary from case-to-case and from region to region. Note the revisions recommended for subsections 3833(b)(2) and 3833(b)(5). (See also responses to Comments E-11 and E-14.)

Comment G-8: **Subsection 3833(b)(2)(B) should be revised to preclude federal agencies from having to pay certification fees.**

Response: The case cited by the Commenter is currently on appeal to the United States Court of Appeals for the 9th Circuit. Until that appeal is decided, it cannot be predicted with certainty whether the federal courts will allow states to collect fees from federal agencies. If the 9th Circuit decides that no fees are required for the Corps' dredge/fill civil projects, then the proposed fees will not apply (see new proposed § 3833(f)). If the 9th Circuit decides that federal agencies can pay state fees, or a subsequent Act of Congress clarifies that federal agencies must pay their fees, then the proposed fees will apply.

Comment G-9: **The proposed regulations require payment in full of the correct fee as a condition of the validity of any certification. This requirement runs afoul of the Corps' inability, as a federal agency, to pay state fees.**

Response: As stated above, the issue of whether the Corps will be required to pay fees to the State will be decided in the courts (see response to Comment G-8). The revised language in subsections 3833(f) and 3860(c) should accommodate whatever decision is reached in that litigation.

Comment G-10: **Section 3833(d) appears to allow the Regional Boards or the State Board to waive certification, by electing not to take an action. Under what circumstances can the certifying agency "elect" not to take an action? If the certifying agency elects not to take an action, it appears the applicant will be left without a certification or a denial that could be appealed. Is "election" not to take an action something that can be appealed under the proposed petition process? How can an applicant comply with the 30 day appeal period when he/she may not know when the certifying agency has elected not to take an action?**

Response: The proposed regulations were meant to require that a timely certification action be taken for every application, rendering these questions moot. Subsections 3833(d) and 3859(a) have been revised to emphasize this.

Comment G-11: **The Commenter objects to the phrase "other pertinent requirements."**

Response: See responses to Comments C-1 and D-7.

Comment G-12: **The public participation/hearing process in proposed section 3835 might be better handled in coordination with the Corps' public notice process codified in 33 CFR section 327.**

Response: Staff agrees in theory. However, a significant portion of certifications involve either other federal agencies or non-reporting Nationwide permits that will not go through a project-specific federal public notice process and that have not yet received State certification. Development of appropriate mechanisms to fully address this concept would, in Staff's opinion, require extensive additional time and effort outside of the current scope and schedule of this particular rulemaking effort. To set the stage for such a future effort, subsection 3858(a) has been revised accordingly.

Comment G-13: **The "waiver" of certification should be retained in the proposed regulations.**

Response: Staff disagrees. See response to Comment A-2. By preserving the power of aggrieved persons to petition for State Board review, the use of standard certification instead of waiver helps maintain State Board oversight of actions taken pursuant to delegated authority and helps further the public participation goals of the federal Clean Water Act.

COMMENTER H.

Affiliation: Tri-Dam Project
Commenter: Steve Felte
Title: General Manager
Address: Box 1158
Pinecrest, CA 95364

Verbal Comments: June 8, 1999 Public Hearing

Responses to Comments -- I

PH Comment H-1: **Concerning hydroelectric project-related certification fees, some mechanism is needed for reporting program expenditures for greater-than-minimum project application efforts.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

PH Comment H-2: **The proposed regulations should allow that an application for certification may be denied <u>without prejudice</u> if a fee is not provided.**

Response: Agreed. Subsection 3837(b)(2) addresses this issue.

PH Comment H-3: **The proposal to extend the time allowed for filing a response to a petition should be limited.**

Response: Experience has demonstrated that each petition situation may differ significantly, and that the time required may also differ. This decision is best left to the discretion of the reviewer. In cases where time is of the essence, the applicant or the petitioner can make that known to the Executive Director and/or the State Board.

COMMENTER I.

Affiliation: United States Department of Agriculture
Forest Service
Pacific Southwest Region
Commenter: Laurie Fenwood
Title: Director, Ecosystem Conservation
Address: Regional Office, R5
1323 Club Drive
Vallejo, CA 94592

Written Comments: June 10, 1999 Letter
3 pages (includes copy of June 8, 1999 presentation by John Rector)
June 8, 1999 FAX
3 pages (includes copy of June 8, 1999 presentation by John Rector)

Responses to Comments -- I

Comment I-1: **Delegation of certification authority to the Regional Board is a commendable idea.**

Response: Staff acknowledges the comment.

Comment I-2: **The proposed regulations may be misapplied to federal agency permits for activities with the potential to generate nonpoint discharges.**

Response: The Commenters themselves identify why this issue cannot and should not be addressed specifically in the proposed State regulations: the definition of the term "discharge" in the Clean Water Act and what qualifies as a "discharge" under section 401 is a matter of ongoing federal judicial interpretation. The specific definition proposed by the Commenters, which is the Clean Water Act definition of the somewhat narrower term "discharge of a pollutant," would improperly exclude some discharges case law recognizes as point source discharges subject to section 401 of the Clean Water Act. Staff therefore chooses not to risk defining the term "discharge" prematurely, incorrectly, or inappropriately in the proposed regulations. (See also response to Comment A-5.)

Verbal Comments: June 8, 1999 Public Hearing
Commenter: John Rector (Regional Hydrologist)

PH Comment I-3: **(Same as Comment I-1.) Delegation of certification authority to the Regional Board is a commendable idea.**

Response: Comment noted.

PH Comment I-4: **(Same as Comment I-2.) The proposed regulations may be misapplied to federal agency permits for activities with the potential to generate nonpoint discharges.**

Response: See response to Comment I-2.

COMMENTER J.

Affiliation: North Marin Water District
Commenter: Chris De Gabriele
Title: General Manager

Responses to Comments -- I

Address: Post Office Box 146
999 Rush Creek Place
Novato, CA 94948

Written Comments: June 8, 1999 FAX (2 pages)
June 8, 1999 Letter (1 page)

Comment J-1: **It is unclear whether these regulations will apply to the District's construction, operation, maintenance, and repair functions.**

Response: Clean Water Act section 401 language, which these regulations are based on, appears clear and unambiguous. If an activity requires the project proponent to seek a federal license or permit, and may result in a discharge to national waters, the applicant is required to request state water quality certification. Specific determination of exactly which activities need a federal license or permit depends on various federal laws and agency rules. In short, the proposed State regulations intend and should result in no change in applicability of the program to any particular District activity. (See also responses to Comments A-5 and G-5.)

Comment J-2: **How might section 3861, certification for classes of activities, apply to District operations, maintenance, and construction activities?**

Response: See response to Comment L-6 and revisions to the proposed regulations. Section 3861 is intended to clarify that certification may be granted for repetitive or similar activities, including maintenance activities, if they are subject to the need for certification (see response to Comment J-1) and will not collectively result in significant harm to water quality resources. If applicants are planning to engage in repetitive activities, they may request general certification from the appropriate certifying agency, subject to all requirements elaborated in section 3861. For example, keep in mind that the CEQA documentation necessary to allow general certification may need to be more extensive than that for project-specific certification. Additional information about this program will be available from the State Board if and when regulations are officially implemented.

Comment J-3:	**The Commenter expresses support for Regional Board workshops.**
Response:	Comment noted.
Verbal Comments:	June 8, 1999 Public Hearing
Commenter: Address:	Drew McIntyre (Chief Engineer) P.O. Box 147 Novato, CA 94948
PH Comment J-4:	**(Same as Comment J-1.) Would like to see "activity" better defined so as to better understand how the proposed regulations will affect water district operations.**
Response:	See response to Comment J-1.
PH Comment J-5:	**(Same as Comment J-2.) How might section 3861, certification for classes of activities, apply to operations, maintenance, and construction activities?**
Response:	See response to Comment J-2.
PH Comment J-6:	**(Same as Comment J-3.) The Commenter expresses support for Regional Board workshops.**
Response:	Comment noted.

COMMENTER K.

Affiliation:	Pacific Gas and Electric Company
Commenter:	Robert Harris
Title:	Vice President, Environmental Affairs
Address:	Mail Code 832 P.O. Box 770000 San Francisco, CA 94177 77 Beale Street San Francisco, CA 94105
Written Comments:	June 7, 1999 Letter 8 pages

Responses to Comments -- I

Comment K-1: **The workshop notice and proposed regulations do not provide substantiation for the proposed increased fees for 401 certification.**

Response: On the contrary, as discussed in the notice, the new fees for hydroelectric projects are clearly needed to compensate the State Board for its costs of processing and reviewing applications for certification for hydroelectric projects. The Initial Statement of Reasons discusses the major workload expected as a result of the need to issue certification for the large block of FERC relicensing projects anticipated in the next several years and the limited amount of general funding available.

Comment K-2: **There is no evidence or record to substantiate the increase in fees for 401 certification as proposed in subsection 3833(b).**

Response: Staff must disagree. Under California Water Code section 13160.1, the State Board has full statutory authority to "establish a reasonable fee schedule to cover the cost of giving any certificate...including certificates requested...pursuant to section 401 of the [Clean Water Act]." Section 13160.1 provides authority for the State Board to recover its entire costs of processing an application for certification, not just a portion of costs.

Historically, the State Board has borne the bulk of the costs of processing applications for section 401 certification out of its General Fund budget. As explained in the Initial Statement of Reasons, however, additional resources will be required in the future because of the extent of relicensing that will take place in California in the next 15 to 20 years. Having applicants pay the cost of certification is consistent with Governor Davis' policy "that those who are regulated should pay for the cost of regulation under the `polluter pays' principle" (Governor's Fiscal Year 1999-2000 budget message).

Comment K-3: **The megawatt size of the facility does not provide a rational basis for establishing a fee schedule for processing the application for 401 certification. The Commenter suggests that the State Board consider setting up a tiered fee structure based on the anticipated level of effort associated with processing applications for different types of 401 certifications.**

Response: Staff agrees that a facility's megawatt size should not be used as a basis for scheduling fee deposits, however there is no need to establish a tiered fee structure. The proposed regulations were intended to base FERC-related certification fees on actual application-processing costs. Subsection 3833(b)(1) has been revised to more clearly indicate this.

Comment K-4: **Based on the assumption that existing fees have adequately covered incremental program costs up to now, the State Board does not cite the statutory authority to charge new, much larger fees to pay for general program costs incurred under the certification program.**

Response: The Commenter erroneously assumes that the State Board will charge certification fees that will include costs not reasonably identifiable with a specific application. The proposed regulations (§ 3833(b)(1)(B)-(C)), however, are clear that the fees are only intended to cover the State Board's reasonable costs of processing the application. The fees are thus not intended to recover general program costs, such as costs of preparing and adopting regulations to implement the program.

In a footnote, the Commenter contends that authority is not cited in support of proposed section 3833 fees. In answer, see response to Comment K-2.

Comment K-5: **The proposed large increase in fees appears to violate Government Code section 11010, which limits the fees agencies may charge to actual/reasonable costs of providing a service.**

Response: Government Code subsection 11010(b) does not expressly limit fees to costs specifically attributable to an individual application, and has not been so interpreted. To the contrary, the reasonable cost of providing a service necessarily includes both the costs attributable to an individual application plus a fair apportionment of the overall program costs that cannot be attributed to any one application but are part of the overall costs of processing all applications. However, as previously noted, the proposed fees will not cover general program costs. (See also responses to Comments F-2, K-2, and K-4.)

Comment K-6 **If the State Board intends to incur additional fees in connection with the 401 certificate review process, then it must describe these costs in a notice and allow public comment.**

Response: The concern appears to be that the proposed application fees will include general program costs beyond review of individual applications. The proposed fees are not so intended. See response to Comment K-4.

Comment K-7: **The scope of section 401 certification must be limited to compliance solely with water quality standards.**

Response: See responses to Comments C-1 and D-7.

Comment K-8: **The time provided for payment of fees should be extended and an application should not be denied because of late payment of fees. If denial is required, it should be without prejudice.**

Response: Agreed. The regulations have been revised to allow a reasonable sixty days for payment of the fees. Failure to pay fees will remain grounds for application denial, but without prejudice (see § 3837(b)(2) [proposed]).

Comment K-9: **Re-application for applications previously withdrawn should be handled in the same fashion as applications that were denied without prejudice.**

Response: Agreed. Subsection 3833(b)(4) has been changed accordingly.

Comment K-10: **Applications for certification for activities at FERC facilities that involve another federal license or permit and that do not require an amendment to the FERC license should continue to be filed at the Regional Boards.**

Response: Agreed. The proposed language in section 3855 has been revised accordingly.

Comment K-11: **The proposed State regulations should include a commitment that the certifying agency take a certification action within the time allowed by federal agency rules.**

Response: Agreed. (See responses to Comments A-2 and G-13.) However, the time period allowed for certification may differ for different federal permits. (See response to Comment A-4.) Under circumstances where procedural deficiencies preclude issuance of certification, the regulations provide for denial without prejudice.

Verbal Comments: June 8, 1999 Public Hearing
Commenter: Richard Moss (Attorney)

PH Comment K-12: **The proposed 100-fold increase in fees is a major program change and needs to be justified.**

Response: See responses to comments K-1 and K-2.

PH Comment K-13: **(Same as Comment K-3.) The relationship between megawatt size and application complexity is not justified.**

Response: See response to Comment K-3.

PH Comment K-14: **Language should be added to section 3833 to require the certifying agencies to maintain a record-keeping account of all expenditures incurred relative to the processing of the 401 certification.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

COMMENTER L.

Affiliation: Campaign to Save California Wetlands Steering Committee
Commenter: Totton P. Heffelfinger
Address: 23 Grant Street, 3rd Floor
San Francisco, CA 94108

Written Comments: June 4, 1999 Letter
2 pages

Comment L-1: **The 30-day time limit to acknowledge completeness of an application for certification should be stricken or made more flexible.**

Response: Staff must disagree. The State Permit Streamlining Act (California Government Code § 65943) allows any State agency reviewing a development project no more than 30 days to assess the completeness of a regulatory program application. If the State agency fails to make its determination within the 30 day period, the application must be judged complete regardless of its contents or lack thereof. Note, however, that Government Code subsection 65943(d) grants applicants and state agencies the ability to mutually extend the 30-day period.

Comment L-2: **The authority granted to a Regional Board Executive Officer to take a certification action should be limited to applications wherein activities would have minor impacts.**

Response: The Porter-Cologne Water Quality Control Act establishes that the Regional Boards are the regional water quality control agencies for the State (e.g., California Water Code § 13225), with full powers to plan and regulate regional water quality. The Regional Boards are required to hire confidential employees to serve as executive officers (California Water Code § 13220(c)). Executive officers implement Regional Board policies and orders, and serve at the pleasure of the Regional Boards (*Ibid*). The Porter-Cologne Act allows the Regional Boards, by default, to delegate authority to issue certifications to the executive officers (California Water Code § 13223(a)). Regional Boards may, at any time, require that a certification action be taken by the full Board. As long as the appeal process is modified as proposed to allow any aggrieved party to petition the State Board for reconsideration of actions or failure to act by an executive officer, the process will be fair to applicants and the public at large and consistent with other water quality regulatory programs.

Comment L-3: **An applicant for water quality certification should be required to demonstrate to what extent proposed mitigation will "fully replace all functions of impacted waters."**

Response: The proposed regulations include a satisfactory number of conditions to ensure that certifications, when issued, will meet statutory requirements. For example, the definitions of "water quality certification," "water quality standards and other requirements," and "certification action" should help guarantee that when a certification action is taken, it will meet the letter of the federal and State laws. The regulations are believed to contain a fair but thorough system of checks and balances that should guaranty that this regulatory program is streamlined, yet appropriately protective of water quality values.

There may be instances when mitigation, including compensatory mitigation, cannot or should not fully replace existing functions. Staff believes that the certifying agencies should and must be allowed a degree of flexibility to analyze individual projects and to condition certifications in order to

meet both federal and State requirements. Staff does not believe that the more stringent language suggested would allow that necessary flexibility.

Comment L-4: **A complete application should provide information on cumulative impacts to the water body in question from other known projects, besides those of the applicant.**

Response: Staff agrees that cumulative impacts should be addressed through various means within a certifying agency's application review. However, the specific requirements made of the applicant are a compromise between requiring full disclosure of all known projects versus no disclosure. Most projects are small, one time events. Analysis suggests that the cumulative impacts from the many small projects are overshadowed by the impacts from large, comprehensive activities. Staff is most concerned about the latter--large, comprehensive, and/or "piecemealed" projects undertaken by applicants who have implemented or will implement other separate or related activities within the same watershed. Staff believes that the current language establishes the proper balance required of the applicant in order to help guaranty reasonable protection of water quality resources without stifling vital economic and development growth.

Comment L-5: **A public hearing should be required before taking certification action on any project that may have more than minor impacts on human health, special aquatic sites, important habitats, or flood plains.**

Response: On the contrary, the option to hold a public hearing should remain just that, an option subject to State and Regional Board discretion.

Comment L-6: **"General" certification of classes of activities should be limited to activities of a similar nature that will not have individually or cumulatively significant impacts, and should avoid special aquatic sites, important habitats, flood plains, and activities that may impact human health.**

Response: Staff agrees that general regulatory actions, if poorly planned and implemented, carry with them the possibility of significant unforeseen impact to the environment. It is therefore appropriate to use caution in designing the rules that would allow such actions. One sensible approach is to look to existing State and federal laws and rules for guidance in this matter.

The State and Regional Boards must adhere to CEQA requirements when taking certification, including general certification, actions. CEQA requires that Responsible Agencies appropriately consider whether approval of a project may have a significant cumulative effect on the environment (see response to Comment F-9).

Furthermore, CEQA and federal Clean Water Act regulations focus attention on critical types of natural habitats that should receive special attention by resource agencies. Staff also notes the opportunity to increase regulatory consistency between the water quality certification and WDRs Programs.

Based on this analysis and comment, section 3861 language has been revised accordingly.

Comment L-7: **Proposed section 3867.1 ("Response to Complete Petitions") should require that notice of a complete petition should be sent to all persons who have made comments at the Regional Board level or who have requested notice.**

Response: This suggestion is unnecessary. One intent of the proposed regulations is to make the certification programs petition language consistent with that in use for the other Regional and State Board regulatory programs. The language, as currently proposed, meets that intent. Furthermore, Staff believes that the proposed phrase "other interested persons" will encompass all individuals who have submitted comments about a certification action during a Regional Board hearing procedure and who have requested notice.

Comment L-8: **The proposed regulations should specify that if additional written material is requested, all persons given notice of the petition should be allowed to comment on the new material.**

Response: Agreed. The proposed language in subsection 3869(b) has been amended to address this concern.

COMMENTER M.

Affiliation: Bay Planning Coalition
Commenter: Ellen J. Johnck
Title: Executive Director
Address: 303 World Trade Center
San Francisco, CA 94111

Written Comments: May 29, 1999 Letter
3 pages

Comment M-1: **Support is expressed for general update of regulations and delegation of certification authority to the Regional Boards.**

Response: Comment noted.

Comment M-2: **The proposed regulations run counter to the Clean Water Act by requiring a denial without prejudice under certain circumstances. When time is running out, the only lawful and fair alternative should be to approve an application.**

Response: Staff must disagree. (See response to Comment C-2.) Contrary to the allegation, a certifying agency does not and will not deal with a denied application "as it finds the time." Denial without prejudice is and will continue to be necessitated by a delinquency on the part of an applicant--lack of CEQA, an incomplete application, etcetera. As responsible employees accountable at all times to the public, the State and Regional Board staff will make every effort to finalize a certification process in a timely fashion. However, the burden should and must be on the applicant to appropriately satisfy any procedural inadequacy.

Comment M-3: **Section 3856 (contents of complete applications) is obscure and leaves open the possibility that additional information could be required.**

Response: See response to Comment R-3, but also response to Comment C-4.

Comment M-4: **The proposed regulations should indicate that the time allowed by federal regulations to take a certification action begins when the State receives a complete application, not when it <u>determines</u> that the application is complete.**

Response: Section 3831 (definitions) was amended to address the Commenter's concerns. (See also responses to Comments C-4 and G-3.)

Comment M-5: **The contents of a complete application that would be required under the proposed regulations appear confusing and/or duplicative.**

Response: See response to Comment R-3.

Comment M-6: **A "reasonable assurance" standard should be used rather than a "if it is clear" standard.**

Response: See response to Comment C-5.

Comment M-7: **The Commenter objects to the phrase "other pertinent requirements" regarding water quality certification jurisdiction.**

Response: See responses to Comments C-1 and D-7.

Comment M-8: **An "aggrieved person" should be defined and limited in nature.**

Response: See responses to Comments C-6 and C-7.

Verbal Comments: June 8, 1999 Public Hearing
Commenter: Ellen J. Johnck

PH Comment M-9: **(Same as Comment M-1.) Support expressed for general update of regulations and delegation of certification authority to the Regional Boards.**

Response: Comment noted.

PH Comment M-10: **(Same as Comment M-2.) The Commenter feels that the proposed regulations run counter to the Clean Water Act by requiring a denial without prejudice under certain circumstances. When time is running out, the only lawful and fair alternative should be to approve an application.**

Response: See response to Comment M-2. It should be added that certification agency staff never treat denial of certification or, indeed, any aspect of the water quality certification process "cavalierly".

PH Comment M-11: **(Same as Comment M-3.) Section 3856 (contents of complete applications) is obscure and leaves open the possibility that additional information could be required.**

Response: See response to Comment R-3, but also response to Comment C-4.

PH Comment M-12: **(Same as Comment M-4.) The proposed regulations should indicate that the time allowed by federal regulations to take a certification action begins when the State receives a complete application, not when it determines that the application is complete.**

Response: See response to Comment M-4.

PH Comment M-13: **(Same as Comment M-5.) The contents of a complete application that would be required under the proposed regulations appear confusing and/or duplicative.**

Response: See responses to Comment R-3.

PH Comment M-14: **The Commenter is concerned that the proposed regulations are "inching towards some requirement for an alternative analysis".**

Response: (See also response to Comment D-4.) The merits of 404(b)(1) Guidelines alternatives analysis aside, the State Permit Streamlining Act (California Government Code § 65920 et seq.) in effect requires that any list of complete application contents be particularly comprehensive and thorough. The proposed list will be critical in providing certifying agencies the ability to secure information necessary to take proper and timely certification actions.

It should also be noted that the Commenter's local Regional Board has already incorporated by reference into its Basin Plan the section 404(b)(1) Guidelines, that include the "Alternatives Analysis" standard for evaluating "the circumstances under which wetlands filling may be permitted" (California Regional Water Quality Control Board, San Francisco Bay Region, Water Quality Control Plan, 1995, Page 4-51). In this Region, at least, the Commenter's concern is moot. At least one other region has also adopted section 404(b)(1) Guidelines concepts (Water Quality Control Plan for the Lahontan Region, Chapter 4, Section 9), but this trend is independent of these proposed regulations or this rulemaking process.

PH Comment M-15: **(Same as Comment M-8.) An "aggrieved person" should be defined and limited in nature.**

Response: See responses to Comments C-6 and C-7.

COMMENTER N.

Affiliation: California Mining Association
Commenter: Denise M. Jones
Title: Executive Director
Address: One Capitol Mall, Suite 220
Sacramento, CA 95814

Written Comments: June 8, 1999 FAX (5 pages)

Comment N-1: **The United States Environmental Protection Agency need not be notified of a complete application or of denial of certification.**

Response: On the contrary, interagency and inter-program coordination are at all times to be encouraged. The few, if any, drawbacks to such coordination are more than outweighed by significant benefits. If such notification is redundant, the agency notified need not act or respond. If not, such notification may result in more appropriate and effective regulation on behalf of public resources. This minor requirement is fully justified and a proper component of any responsible regulatory program.

Comment N-2: **Regarding notification of denial of certification, the phrase "as soon as possible" in section 3837 should be enumerated. A five-day limit is requested.**

Response: Agreed. However, because the petition period lasts only 30 days after the certification action, Staff has elected to shorten the notification period to three (rather than five) days.

Comment N-3: **When an Executive Officer is required by section 3838(c) to deny an application without prejudice pending Regional Board review, the Regional Board should be required to address the denied application within 30 days.**

Response: Staff disagrees. (But see also responses to Comments B-3, and F-6.) The Regional Boards may, on occasion, be legitimately unable to meet such an artificial deadline. Keep in mind that the requirement for denial without prejudice is not an attempt to bypass any federal time limit--it is instead a procedural necessity intended to help guarantee State water quality authorities and safeguard public resources.

Comment N-4: **The Commenter objects to the "final goal" requirement in section 3856.**

Response: Describing the final goal of a project in an application should be relatively easy and straightforward, and no significant burden to an applicant. Normally such information should not affect the outcome of a certification decision. However, it may prove important in critical instances when project layout and goals are vague or incomplete. And this information, which may be consequential, must be required from the start of the application procedure, since once an application is deemed "complete," the agency may not request any additional information (California Government Code § 65944(a)).

An example might be a construction project that is only part of a much larger whole, or that will eventually be critical to a forthcoming project. Sometimes these facts are not clear in an application, even with accompanying CEQA documentation. In such cases an understanding by certification staff of the final goal and eventual extent of a large or otherwise sensitive project may have a significant bearing on, for example, development of appropriate certification conditions designed to safeguard water quality standards or satisfy other requirements.

Comment N-5: **Concerning the tiered requirements for information about the federal license/permit in subsection 3856(d), the Commenter asks confirmation that:**

1. The third requirement would not be triggered if either the first or second requirement are satisfied?

2. The second requirement refers specifically to federal Public Notices?

Response:

1. Yes.

2. The proposed language is purposely non-specific, in case any other type of unanticipated notice might exist and be helpful. However, Staff had federal Public Notices in mind.

Comment N-6: **The certifying agency should not really require all correspondence between the federal agency and applicant concerning the project?**

Response: Normally, that should be the case. However, the varied federal and State laws which must be observed necessitate that the requirements for a complete application be initially very comprehensive (see response to Comment N-4). Fortunately, the need for copies of applicant-federal agency correspondence about the project is only triggered if no application or federal notice is available. Then too, the specific details of exactly what copies of correspondence must be supplied can be worked out on a case-by-case basis between the certifying agency and applicant. Also, at its discretion, a certifying agency may allow a index to be submitted in place of the actual documents. Nonetheless, the certifying agency must have the initial ability in these regulations to request the full range of information in case it should later be critical to an application process.

Comment N-7: **The Commenter objects to complete application requirements for information about the full extent of the project area.**

Response: The Clean Water Act and pertinent case law (e.g., *PUD No. 1* v. *Washington Department of Ecology* (1994) 511 U.S. 700, 114 S.Ct. 1900) indicates that once the water quality certification process is triggered, any ensuing certification can and should address all pertinent aspects of both the Clean Water Act and of State laws. In this instance, since the definition of "waters of the State" regulated under State water quality law is broader than "waters of the United States" controlled under the Clean Water Act, it is appropriate that certifying agencies ask for information outside of federal jurisdictional waters.

Comment N-8: **Section 3856(h)(8) asks for information that is duplicative and that will be included in CEQA documentation.**

Response: See responses to Comments F-9, R-3, and R-8.

Comment N-9: **The Commenter feels that the 21-day public notice requirement will interfere with streamlining intended to result from the Corps' Nationwide Permit program. Instead, the State should certify all Nationwide Permits.**

Response: Staff cannot comply. The Clean Water Act requires that certifying agencies establish procedures for public notice for all certification applications (33 USC § 1341(a)(1)). The goals of the Clean Water Act also specify that the state's should encourage public participation (*Id.* § 1251(e)). The 21-day provision is entirely reasonable, and has been an ongoing State and Regional Board policy since December 27, 1994. To the extent that any nationwide permits are certified, there should not normally be a need for any additional public review period for a specific project covered under the certified federal permit.

Issuance or denial of certification of specific permits or categories of permits, including Nationwide permits, is beyond the scope of this rulemaking proposal. Moreover, the State Board does not have before it the information that would be necessary to issue certification, or to decide what conditions of certification would be appropriate. An unknown multitude of

discharges would result from the activities that would be authorized by the 40-odd Nationwide Permits. Not all individual and cumulative impacts resulting from the Nationwide Permits are insignificant in terms of the environment and water quality. This fact, among others, precludes certification of all activities proposed under the Nationwide Permits without additional information and appropriate environmental documentation.

Comment N-10: **The Commenter asks for confirmation that the subsection 3831(c)(3) definition of "applicant" is only intended to apply when the federal agency applies for a general permit certification?**

Response: Yes, under the proposed regulations this language would apply, for example, to federal agencies that seek certification related to regional, statewide, or nationwide general permits.

Comment N-11: **Section 3868, which regards defective petitions, should be deleted. There should be no opportunity to amend a defective petition. If there must be an opportunity, there should only be one amendment permitted and that should be filed within 10 days. Any remaining deficiency, or failure to meet that deadline, should result in dismissal of the petition with prejudice.**

Response: The Commenter's position seems unnecessarily harsh. First, deleting section 3868 would probably cause more problems than those that the commenter seeks to solve. It would leave more room for the discretion of the Board's staff to treat defective petitions in any manner it chooses. Second, amending the section to severely limit the number and timing of amendments to petitions unnecessarily constrains the process in all situations in order to accommodate the needs of a subset of cases. In the area of certifications, there may in some cases be a need for speedy resolution of a given petition. The applicant can make that case known at the time of the petition, and the Board can handle the case appropriately. There will be other certifications for large or complex projects that will not be time-critical or be extremely complex so that greater time and more opportunities to clarify a petition would be advantageous to both the Board and the applicant.

The petition process for the section 401 program was modelled after the process for petition of review of other actions by Regional Boards (23 CCR § 2051 et seq.). There is no evidence that the number of amendments to petitions or the amount of time allowed to respond has been problematic.

COMMENTER O.

Affiliation:	Transportation Corridor Agencies
Commenter:	Steve Letterly
Title:	Director, Strategic Planning
Address:	P.O. Box 28870 201 E. Sandpointe Ave., Suite 200 Santa Ana, CA 92799-8870
Written Comments:	June 7, 1999 Letter (3 pages) June 7, 1999 FAX (3 pages)

Comment O-1: **Rather than automatically deny an application on procedural grounds, a certifying agency should be required to request the federal agency for extension of time needed to fix the problem and to take a certification action.**

Response: See response to Comment B-3.

Comment O-2: **The Commenter objects to the phrase "that the applicant and federal agency are willing or able to accept and implement" regarding denial of certification, pursuant to the proposed subsection 3837(b)(1).**

Response: While the Commenter's fears are probably groundless, the language in question is unnecessary, and has been eliminated.

Comment O-3: **The Commenter objects to reference to water quality standards in subsection 3837(b)(2) as unnecessary if the focus is on procedural inadequacies.**

Response: The Commenter appears to misunderstand the language and intention of this subsection, which clearly states that compliance is <u>not</u> the issue; procedural problems are.

Comment O-4: **What is expected from the requirement, "purpose and final goal of the entire activity"?**

Response: Staff believes that the requirement is straightforward and unambiguous, and that most, if not all, applicants should have little trouble concisely identifying the purpose and goal of a project. (See responses to Comments N-4 and R-31.)

Comment O-5: **The amount of information being requested in section 3856 may be very large.**

Response: True. However, the Commenter appears to have misread subsection 3856(d). The three separate requirements (subsections (1)-(3)) are tiered and mutually exclusive. In general, Staff is intimately familiar with the voluminous nature of the paperwork connected with large and/or controversial projects. Unfortunately, there is frequently no other way to secure all necessary water quality information about a proposed activity then to ask for copies of all pertinent documents. Pursuant to the State's Permit Streamlining Act (Government Code § 65920 et seq.), in order to help guarantee appropriate access to whatever information may truly be needed to reach proper regulatory decisions, agencies are obliged to be very comprehensive in listing the contents of a complete application. (See also responses to Comments F-8, N-5, N-6, R-3, and R-32.)

Comment O-6: **The Commenter objects to the requirement for information about previous and future projects in section 3856(h)(8).**

Response: See responses to Comments F-9, R-3, and R-8.

Comment O-7: **What type of public notice, pursuant to proposed subsection 3858(a) is required?**

Response: Public notice procedures will remain as they are now. Each Regional Board will establish procedures that meet the letter of the law and best address the needs of its constituency. For example, some Regional Boards use their monthly Board meeting announcement to indicate where interested parties may telephone to receive information on individual certification applications.

Comment O-8: **Under what circumstances would a public hearing be necessary?**

Response: Pursuant to Clean Water Act section 401, the certifying agencies will be able to hold public hearings on certification applications at the request of the applicant, the public, or on their own motion. Staff is unable to predict all possible reasons for holding a public hearing. However, in general hearings would be held in order to best serve the public interest on particular issues that are, perhaps, more controversial than normal.

COMMENTER P.

Affiliation: Downey, Brand, Seymour & Rohwer LLP
Representing: Newhall Ranch Company
Commenter: Patrick G. Mitchell
Address: 555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686

Written Comments: June 8, 1999 FAX (7 pages)
June 8, 1999 Letter (6 pages)

Comment P-1: **Notification to the United States Environmental Protection Agency is unnecessary.**

Response: See response to Comment N-1.

Comment P-2: **Once an application is deemed complete, the certifying agency should have no more than 60 days to take an action, or else the request would automatically approved.**

Response: See response to Comment A-4.

Comment P-3: **Why must the United States Environmental Protection Agency be notified of denial of certification?**

Response: See response to Comment N-1.

Comment P-4: **The applicant should be notified of any denial of certification within five days.**

Response: See response to Comment N-2.

Comment P-5: **When an Executive Officer is required by section 3838(c) to deny an application without prejudice pending Regional Board review, the Regional Board should be required to address the denied application within 30 days.**

Response: See response to Comment N-3.

Comment P-6: **Suggest that requirements in a complete application for the "final goal" of a project be removed.**

Response: See responses to Comments N-4, O-4, and R-3.

Comment P-7: **The Commenter inquires about the tiered requirements in proposed section 3856(d)--copies from the applicant of information about the federal permit.**

Response: See responses to Comments F-8, N-5, and O-5.

Comment P-8: **Does the certifying agency really require all correspondence between the federal agency and applicant concerning the project?**

Response: See responses to Comments N-6 and O-5.

Comment P-9: **The Commenter objects to complete application requirements for information about the full extent of the project area.**

Response: See response to Comment N-7.

Comment P-10: **Section 3856(h)(8) asks for information that is duplicative and that will be included in CEQA documentation.**

Response: See responses to Comments F-9, R-3, R-5, R-8, R-31, and R-32.

Comment P-11: **The 21-day public notice requirement in subsection 3858(a) is cause for several concerns.**

Response: The Commenter apparently forgets that water quality certification is not solely about projects seeking Corps permits, or that not all Corps permits require public notice. (See also responses to Comments G-12 and N-9.)

Comment P-12: **The Commenter asks for confirmation that the subsection 3831(c)(3) definition of "applicant" is only intended to apply when the federal agency applies for a general permit certification.**

Response: See response to Comment N-10

Comment P-13: **An "aggrieved person" should be defined and limited in nature.**

Response: See responses to Comments C-6 and C-7.

Comment P-14: **Subsection 3867(b) runs counter to the intention to delegate certification authority to the Regional Boards, and it should be eliminated.**

Response: See response to Comment F-13.

Comment P-15: **Section 3868 (defective petitions) should be deleted, or at least revised to establish specific time limits.**

Response: See response to Comment N-11.

Comment P-16: **The Commenter objects to the holding of a public hearing on a petition.**

Response: Where additional evidence is proposed for consideration, an evidentiary hearing may be appropriate to allow interested parties to challenge evidentiary submittals. A hearing may also be appropriate to allow broader public participation, especially where the State Board's decision could establish a precedent.

COMMENTER Q.

Affiliation: California Building Industry Association
Commenters: Clifford H. Moriyama, and
Rex Hime, California Business Properties Association
Valerie Nera, California Chamber of Commerce
Address: California Building Industry Association
1215 K Street, Suite 1200
Sacramento, CA 95814

Written Comments: June 8, 1999 FAX (4 pages)

Responses to Comments -- I

Comment Q-1: **The definition of "water quality standards and other pertinent requirements" is overly broad and should, instead, be limited only to those provisions the Commenter believes are specifically identified in the Clean Water Act.**

Response: See responses to Comments C-1 and D-7.

Comment Q-2: **The course of action proposed in section 3836, to deny certification without prejudice when faced with procedural difficulties, would contradict federal streamlining.**

Response: See response to Comment C-2.

Comment Q-3: **The Commenter supports Staff's intention to delegate limited certification authority to the Regional Boards.**

Response: Comment noted.

Comment Q-4: **Section 3856 should be amended to specify that if all information is supplied, the application will be deemed complete.**

Response: Rather than section 3856, Staff proposes to revise section 3831(f) to address this comment.

Comment Q-5: **The time limit for acknowledging a complete application should be no more than 30 days from determination.**

Response: See response to Comment B-1.

Comment Q-6: **The standard for issuing water quality certification should reflect what the Commenter believes is a Clean Water Act "reasonable assurance" standard.**

Response: See response to Comment C-5.

Comment Q-7: **An "aggrieved person" should be defined and limited in nature.**

Response: See responses to Comments C-6 and C-7.

COMMENTER R.

Affiliation: California Association of Flood Control Agencies
Commenter: Jim Noyes
Title: Chairman
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900 South Fremont Avenue
Alhambra, CA 91803-1331

Written Comments: June 8, 1999 FAX (12 pages)
June 8, 1999 Letter (11 pages)

General Comments:

Comment R-1: **"Any time limits on processing applications by the Regional Board should include a step to approve or deny the application within a specific time frame."**

Response: See response to Comment A-4.

Comment R-2: **"In order for the regulated community to effectively respond to the State's concerns, the State should provide reasons for the denial and `justification of the reason.'"**

Response: Staff does not believe that in this case there is a meaningful difference between providing reasons for an action and justifying that action. If the reasons provided for an action are grounded in law and regulation, as they will and must be, then the justification for the action will be clear. No amendment of the proposed language is therefore necessary.

Comment R-3: **The Commenter objects to the "expanded" requirements for a complete application.**

Response: Staff believes that:

1. The information requested is entirely reasonable and necessary in order to administratively handle applications and to properly implement the requirements of Clean Water Act section 401.

2. The revised list of information will not significantly increase the demand on most applicants, because most of the new information is actually required already in one

form or another in order to process certification applications.

3. The State should and must develop such a comprehensive list of information needed for a complete application. The Permit Streamlining Act (Government Code § 65920 et seq.) requires that the list of materials required for a complete application must be comprehensive and complete--no additional new requirements may be added.

4. Section 3856 has been revised to clarify the fact that information in applications need not be unnecessarily duplicative.

   Please note, however, that federal applications and CEQA documents, both of which vary widely in the quantity and quality of information provided, rarely supply all information necessary to properly take an appropriate certification action.

Comment R-4: **The proposed regulations should include an appropriate time period for issuance of certification based on federal time limits.**

Response: See response to Comment A-4.

Comment R-5: **When a State certifying agency is only a "Responsible Agency" under CEQA, it is limited in its CEQA powers. The proposed changes to the certification regulations could discourage proper implementation of CEQA by the certifying agencies acting as Responsible Agencies under CEQA. The State should focus on proper proactive consultation and coordination.**

Response: Staff agrees that the State certifying agencies should be granted the necessary resources to be proactive in project planning processes. However, the CEQA process does not replace the Clean Water Act section 401, or any other regulatory program, process. For example, CEQA states, in reference to a Responsible Agency participating in the CEQA process and developing findings:

Compliance...by a[n]*...agency having jurisdiction*

> *over natural resources affected by the project with...*[CEQA reporting and monitoring requirements] *shall not limit the authority of the...agency ...to approve, condition, or deny projects as provided by...any...provision of law.* (California Resources Code § 21081.6(c))

Contrary to the implication of the comment as a whole, the State Board must occasionally assume Lead Agency responsibilities for critical applications for certification. For example, this happens when a federal Agency requests certification for a general permit, an increasingly common occurrence. A certifying agency cannot predict if and when it will have to be Lead Agency for future projects. Therefore, as allowed by State law, the certification process must be appropriately comprehensive. The Permit Streamlining Act (California Government Code § 65941(b)) states that "[a complete application list] may require sufficient information to permit the [Lead] agency to make the determination required by section 21080.1 of the Public Resources Code."

Despite the good intentions of CEQA and other State laws, applications, even those with otherwise "full" CEQA compliance, frequently lack adequate water quality-related information necessary to make an appropriate certification determination. Yet by law (Clean Water Act section 401) such an appropriate determination must be made. A properly comprehensive certification application review is a certification agency's best defense against legal vulnerability.

Specific Comments:

Comment R-6: **The proposed definition of "certification action" should be revised by:**

1. **Including cases where the certifying agency chooses not to act on an application.**

2. **Including instances where the Executive Director or an Executive Officer takes a certification action without "issuance of an order" (i.e., a State or Regional Board action is not taken).**

3. **Establishing that if an agency does not take a certification action, certification and WDRs are waived.**

Response: Staff disagrees for the following reasons. (See also responses to Comments A-2 and G-10.)

1. The proposed regulations are not intended to encourage failure to act, which smacks of encouraging agency negligence, as a practical option. The proposed courses of action open to the agencies are to issue or deny water quality certification. Standard certification is available for streamlining purposes. There will normally be no legitimate reason why a certifying agency should fail to take an action.

2. Taking all certification actions will be by issuing "...an order granting or denying certification." (23 CCR § 3831(e)(1)) There will be no instances where the certifying officer takes a certification action without issuance of an order.

3. This suggestion is infeasible and/or ill-advised. First, California law does not provide for waiver of WDRs through inaction. Second, as stated in Comment A-2, use of standard certifications preserves the streamlining purposes of waivers, without sacrificing public participation or State Board oversight.

Comment R-7: **The phrases "...and other pertinent requirements" and "...and any other appropriate provisions of federal and state law" should be deleted.**

Response: See responses to Comments C-1 and D-7.

Comment R-8: **The water body definition in language on complete application contents is much too broad.**

Response: See responses to Comments F-9, and also L-4. Regulators must know how and to what extent a proposed activity may individually or cumulatively impact a receiving water body and downstream water resources. Furthermore, under CEQA, certifying agencies must consider cumulative impacts to the environment. The proposed language is not only defensible, but actually conservative in scope.

Comment R-9: **A definition of "conditional water quality certification" should be provided.**

Response: The recommended definition is unnecessary. Furthermore, all certifications will be conditioned (see § 3860). The word "conditional" was used in this instance only to point attention to a requirement for subsequent notification before starting a project, a possible condition of some certifications.

Comment R-10: **Local, State, and federal agencies should be exempt from having to pay the proposed water quality certification fees.**

Response: The Porter-Cologne Water Quality Control Act clearly allows fees to be collected that cover the full cost of water quality certification "which is required or authorized by any federal law with respect to the effect of any existing or proposed facility, project, or construction work upon the quality of waters of the state..." (emphasis added) (California Water Code § 13160.1). This mandate is unambiguous in its intended scope.

A significant percentage of applications for water quality certification originate with local, State, and federal agencies. Many of these require substantial amounts of time to handle and process. The proposed fees are intended to reimburse the State fairly for its efforts to process applications. Excluding fees for public agencies would seriously jeopardize the certification program's ability to properly regulate various

categories of impacts to water quality resources. This would be contrary to public interests. In addition, uncompensated program costs might, to some additional extent, have to be passed on to other applicants. That would be unfair.

Comment R-11: **The water quality certification fees proposed are too high and should be reduced.**

Response: The Commenter's objections appear to focus on the proposed $500 fee for standard certification. This is objection is surprising, as the proposal would halve the current $1,000 minimum certification fee for discharge of fill (see 23 CCR § 2200(e)), thereby benefiting applicants.

Staff does not agree that many activities under the federal Nationwide Permit program, and excavation activities in particular, have minimal water quality impacts. Objective reports say otherwise. The State has been unable to issue blanket water quality certification for most Nationwide Permits for exactly the opposite reason--individually or cumulatively these activities may have significant impact on beneficial uses of water, which include the use of water to sustain aquatic and riparian resources.

As discussed in the State Board's "Initial Statement of Reasons" (available to any requestor), experience demonstrates that a minimum total of ten staff hours, at $50 per hour, is usually needed to handle and process applications and to issue water quality certification for those projects without water quality impacts. When, after appropriate review, conditions must be developed to safeguard water resources from potential impacts, the time needed to process an application increases accordingly. The $500 proposal is the minimum fair fee that should be charged if the State is to be appropriately reimbursed for efforts to issue certification.

Comment R-12: **Subsection 3833(b)(2)(A) should be revised to clarify that there is no fee difference between standard and non-standard certifications.**

Response: The Commenter appears to misunderstand the intention of this language. (The language was, perhaps, unclear.) The fee for standard certification for projects that should not significantly impact water quality resources is intended to be $500. The fee to handle non-standard certification would be derived, with no change, from the comparable WDRs program fee schedule for discharges of dredged and fee materials. In short, the two types of certification fees (standard and non-standard) were never intended to be equivalent, for the reasons stated in the response to Comment R-11. Language in this subsection was revised to clarify these facts.

Comment R-13: **The proposed fee schedule should be based on threat to water quality and categories of activities.**

Response: The Porter-Cologne Water Quality Control Act states that the certifying agencies may charge a reasonable fee for "giving" certification (California Water Code § 13160.1). A fee schedule for reviewing projects which might discharge dredged or fill materials already existed in the regulations for State water quality permits, the WDRs Program (23 CCR § 2200(e)). Because review of reports of waste discharge and applications for water quality certification for dredge/fill activities require similar review efforts, the section 2200(e) fee schedule has been successfully shared by the two programs for some time. (There are some differences. WDRs fees are annual fees for the life of an activity. Certification fees are intended to be a one-time fee.)

The Commenter's reference to subsection 2200(a) is therefore not supported in this instance. WDRs fee regulations clearly differentiate between dredge/fill activities (subsection (e)) and other types of activities, as pointed out in subsection 2200(a)(1).

Comment R-14: **"Licensee/permittee" and "notice" should be defined in the proposed regulations.**

Response: These suggestions are unnecessary. The word "notice" is, in effect, defined within subsection 3833(b)(3) itself. The phrase "licensee/permittee" refers to persons seeking a federal license or permit that requires water quality certification, and is used only in this subsection. Staff believes that its meaning is self-explanatory, especially when taken in the context of the regulations. Staff sees no further reason to define these commonly used and understood words in the proposed regulations.

Comment R-15: **Subsection 3833(b)(4) does not describe how a returning applicant is to know what fee or portion thereof is still due after denial without prejudice has been issued.**

Response: The proposed regulations require that an applicant "be notified in writing of the denial and the reasons for the denial." (23 CCR § 3837(a)) Since failure to pay a complete fee is a reason for denial, the applicant will clearly learn of it at the time of denial.

Comment R-16: **The word "significantly" should be defined.**

Response: The language in question includes a clear and obvious explanation of what "significantly" implies--i.e., "no further technical review is necessary". No further revision is therefore required.

Comment R-17: **The requirement that an applicant pay both an initial water quality certification fee and any subsequent WDRs fee should be eliminated.**

Response: See response to Comment R-6 and language changes proposed in response to Comment S-15.

On occasion, a certifying agency may need to issue WDRs simultaneously with water quality certification. If so, the proposed language would ensure that an applicant would pay only one reasonable fee for the simultaneous work necessary to review the project for both regulatory actions.

However, an agency may also need to exercise its State water

quality permit authority after having previously issued certification under its Clean Water Act jurisdiction (e.g., if circumstances surrounding a project were to change significantly to the detriment of water quality). This may happen at any time after certification is originally granted and after the State effectively looses the ability to further regulate the project via the Clean Water Act certification program. Under such circumstances, additional review of a project (requiring additional staff efforts) might be called for before taking further regulatory action. The State should be appropriately reimbursed for these efforts, which would not be intended to "penalize" an applicant, but instead to reasonably protect California's water resources from a new threat not anticipated during the initial certification process.

Comment R-18: **The phrase "certifying agency" should be defined in proposed section 3831.**

Response: This term needs no definition in the regulations. As the proposed regulations make clear throughout, only the State and Regional Boards would be certifying agencies.

Comment R-19: **Section 3833(d) should be revised to clarify the refund of an application fee when the certifying agency handles an application but takes no action.**

Response: The intent of these regulations is that a water quality certification action will be taken on all applications. The question of refund is therefore moot, and the original section 3833(d) language has been removed.

Comment R-20: **Replace the words "environmental impact report or other similar" with "CEQA" in subsection 3833(e).**

Response: Agreed. In addition, there may on occasion be other special reports required in order to make a proper certification evaluation. Their cost would also not be included in a standard certification fee. The language in question has been revised accordingly.

Comment R-21: **Fee requirements should be exempted when an entity has funded a staff position with a certifying agency.**

Response: These regulations are not the appropriate vehicle to address this idea. The current fee schedule is, in staff's opinion, adequate in and of itself. If and when an agreement between an applicant and certifying agency is reached for the applicant to fund a certification staff position, the total value of the contribution can be determined and applied proportionately against future application fees.

Comment R-22: **Economies of scale should be considered in the fee structure for applicants that submit multiple-project applications.**

Response: Staff disagrees. There are two broad types of multiple-activity projects: those that involve various types of activities on different water bodies with differing water quality impacts, and similar, repetitive projects on the same or related receiving waters where the impacts are similar from site to site.

The first case involves no "economy of scale." Any time savings from handling a single package will be offset by the effort required to review what will in all likelihood be a large, complex, and complicated series of documents. Experience shows that analysis of CEQA documentation for large, comprehensive projects encompassing more than one type of activity/impact is arduous. Such general planning (as opposed to project-specific) documents frequently lack specific water quality information necessary to properly make a finding of no significant water quality impacts.

The second case has been addressed in the proposal (§ 3861) to allow "general certification" for classes of repetitive activities, provided that there is no significant individual or cumulative impact to water quality values. If an applicant intended to perform multiple projects with little total impact, a single application requiring only one fee could be filed with the certifying agency.

Comment R-23: **The time limit for acknowledging a complete application should be no more than 30 days from determination.**

Response: See response to Comment B-1.

Comment R-24: **"Regional Board's water quality control (basin) plan" should be defined in the proposed regulations.**

Response: There is no need. The term "basin plan" is referenced only twice in the proposed regulations, its meaning is clear when in the context it appears in, and a short elaboration of "basin plan" is already included in subsection 3836(a).

Comment R-25: **Subsection 3836(b) should be revised to include a 30-day time limit to review any additional information requested.**

Response: Subsection 3836(b) only applies when a federal agency-established expiration date is imminent (for Corps-permitted projects, probably less than 30 days). Receiving supplemental information could not change the federal deadline, and denial without prejudice would still be necessary.

Comment R-26: **The period for certification should be able to be extended by the State agency upon agreement with the applicant.**

Response: Compliance with this suggestion is not possible. The time allowed for state certification is determined by the federal licensing/permitting agency's rules.

Comment R-27: **Language regarding notice of denial of certification should be revised. The Commenter requests that (a) a 30-day time limit on notification be included, and (b) the phrase "other interested persons and agencies" be omitted.**

Response: (a) See response to Comment N-2. (b) See response to Comment N-1.

Comment R-28: **The "diversion of water" needs to be clarified.**

Response: If a single-region dredge/fill project requires water rights approval for a diversion of water, then the application for water quality certification should be filed at the State Board. This is the standard practice in place now, since the State Board is the sole California water rights agency, although the current regulations do not address it. Individual projects involving temporary diversions at construction sites, for example, which do not normally require water rights approval (and which are not seeking a federal hydroelectric facility license), should continue to apply for certification with the appropriate Regional Boards. This said, a change to the regulation language is unnecessary. (See also response to Comment A-5.)

Comment R-29: **Proposed section 3855, concerning filing an application for water quality certification, should address filing a "notice" from subsection 3833(b)(3).**

Response: Exactly what constitutes an "adequate notice" will be established by whatever individual condition of certification for a general permit triggers the need for such notice. (For the most part it should be a short notice to the appropriate certifying agency announcing implementation of the project.)

Comment R-30: **The required contents of a complete application are overly burdensome.**

Response: See response to Comment R-3.

Comment R-31: **It is inappropriate to require that an applicant provide the "purpose and final goal of the entire activity."**

Response: Providing a concise description of the purpose and final goal of any legitimate project should not be particularly burdensome to an applicant. Such information is included, as a matter of course, in CEQA documentation (and therefore need not be duplicated in the certification application if so identified).

Certification personnel require such information for two primary, but perhaps not widely understood, reasons. First, staff must determine accurately exactly how a project may affect water quality, including individual and cumulative impacts to beneficial uses of water on-site and downstream.

For the vast majority of small, simple projects, this is not difficult. Occasionally, however, large and/or complex projects have hidden impacts that are difficult to initially perceive. A full understanding of the extent and purpose of a project helps certification personnel better uncover potential project impacts and speedily develop appropriate water quality conditions, if such are needed.

Secondly, the Porter-Cologne Water Quality Control Act requires that the agencies consider many factors when evaluating reasonable control of water quality control, including economic considerations and the need for developing housing within the region (e.g., California Water Code § 13241). These are factors that may not seem initially pertinent to a water quality evaluation, but that in reality help staff achieve the proper, lawful balance of protection for beneficial uses of water against other societal priorities. Staff disagrees with the position that "land use" and project goals are outside of State and Regional Boards' purview. Applying the federal anti-degradation policy and other pertinent requirements often requires consideration of the public interest in the project, including social and economic impacts.

Comment R-32: **Lists of all licenses/permits applying to the proposed activity are unnecessary if copies of those licenses/permits are provided.**

Response: Agreed. The list of information and items required for a complete application and contained in section 3856 is intended to be comprehensive. (See also the response to Comment R-3.) However, if one document in an application supplies clear and adequate information, that information need not be duplicated elsewhere in the application. Subsequent guidance and training for this program will assist certifying agencies and the public follow these requirements in a streamlined yet appropriate fashion.

Comment R-33: **Copies of applicant/federal agency correspondence should not be required if a copy of the federal application is in the certification application.**

Response: Agreed. The Commenter has misread the requirements. Copies of any correspondence are only required if copies of any federal application or notification are not available.

Comment R-34: **Draft copies of federal, State, and local licenses/permits/agreements should not be required in the certification application package. In addition, the need for copies of other State and local permits is questioned.**

Response: Other licenses/permits/agreements may have a strong bearing on water quality issues (e.g., Department of Fish and Game Streambed Alteration Agreements, local grading permits, municipal permits of various kinds). In lieu of final versions, draft documents may also provide valuable water quality-related information. At the same time, the certification process should not necessarily be delayed waiting for finalization of other permits, no matter how potentially applicable.

Comment R-35: **The regulations should be revised to indicate that a copy of draft or final CEQA documentation is not a requirement for a complete application, but must be provided in order for a certification determination to be made.**

Response: Agreed. The language has been amended accordingly.

Comment R-36: **"Channels" may also be receiving water bodies.**

Response: The proposed language simply asks for a description of the type of water body. A basic example, which is optional, is provided.

Comment R-37: **The Commenter recommends revising the application requirements to indicate that "Thomas Brothers" maps or a simple vicinity reference may be used to identify nearby water bodies.**

Response: Any "published map of suitable detail, quality, and scale" will meet certification program needs. However, no revision of the regulations is necessary.

Comment R-38: **The word "quantity", as in "quantity of waters", is confusing.**

Response: The phrase "quantity of waters" is used only twice in subsection 3856(h)(4). This section clearly explains that quantity may be measured in either acres or linear feet.

Comment R-39: **References to "excavation" should be removed.**

Response: Agreed. Appropriate revisions have been made.

Comment R-40: **Estimates of mitigation should be required in the application only if known.**

Response: This recommendation cannot be followed. State law (California Government Code § 65944(a)) indirectly requires that if mitigation procedures that will relate to water quality are planned or necessary for a project, the complete details must be included in the initial certification application. (See also response to Comment R-3.) This is because such information may or more likely will eventually be required for any reasonable assessment of an application but, by the Permit Streamlining Act cited above, cannot be requested later in the process. It must be required in the complete application.

Certification agencies must be familiar with final project plans for mitigation and compensatory mitigation before eventually making a certification determination for two basic reasons: (a) to make valid CEQA findings and (b) in order to ensure that water quality standards will not be violated under Clean Water Act provisions.

Comment R-41: **The word "anticipated" should be replaced with "significant."**

Response: In this sentence, the word "anticipated" is descriptive rather than prescriptive. This section is not intended to influence, in one way or another, how mitigation should be determined, just that it be reported if it has already been conceived.

Comment R-42: **Use "significant adverse" to categorize "impacts to beneficial uses".**

Response: Agreed. Appropriate revisions have been made.

Comment R-43: **The requirement that an application including information about the project outside of waters of the United States is excessive and possibly illegal.**

Response: See response to Comment N-7.

Comment R-44: **Proposed section 3856(h)(8) should be eliminated.**

Response: See responses to Comments F-9, R-3, and R-8.

Comment R-45: **The proposed regulations should not require a public participation process.**

Response: On the contrary, a public notice process is required by section 401 of the Clean Water Act (33 USC 1341(a)(1)) and is standard procedure for other State regulatory programs.

Comment R-46: **The public notice language does not address an emergency situation, when action may need to be taken before 21-day public notice requirement can be met.**

Response: The Commenter must have overlooked that an emergency situation is addressed in the latter part of subsection 3858(a).

Comment R-47: **The following language (underlined) should be added to the proposed regulations: "The state board or a regional board may hold a public hearing with respect to any application for certification <u>if a written request stating sufficient reasons for holding a public hearing is received within the comment period</u>."**

Response: The Porter-Cologne Water Quality Control Act clearly intends that the water boards provide the public with the opportunity for a hearing regarding decisions on water quality regulatory activities (e.g., California Water Code § 13384). It also intends that the water boards be able to take actions on their own motion (e.g., California Water Code §§ 13263(e), 13320(a), 13804).

Comment R-48: **Section 3859 should mention "waiver" of certification.**

Response: See response to Comment A-2.

Comment R-49: **Conditions of water quality certification should be based solely on applicable water quality standards, and not on "other pertinent requirements."**

Response: See responses to Comments C-1 and D-7.

Comment R-50: **The word "or" should be inserted in front of "the state board" in proposed subsection 3859(a).**

Response: The suggestion would create an incoherent sentence. If, alternatively, the Commenter intends that "or" proceed "the executive director," Staff declines to make what is an unnecessary change.

Comment R-51: **"Hydrologic unit(s)" should be defined in the proposed regulations.**

Response: There is no need. The phrase hydrologic unit is used only once in the proposed regulations, and then in reference to a Regional Board requirement to supply the State Board with appropriate information.

Comment R-52: **Allowance for not acting on an application should be included in the list of possible certification actions.**

Response: See responses to Comments A-2 and R-6.

Comment R-53: **The phrase "subsequent notification" should be defined.**

Response: The certifying agencies should be allowed reasonable flexibility to craft notification conditions to better match circumstances around individual projects. (See also response to Comment R-29.)

Comment R-54: **During emergencies, timely public notification (i.e., 21 days before a general certification action) may not be possible.**

Response: Agreed. However, as discussed in response to Comment R-46, the public notice language in subsection 3858(a) clearly grants allowance for emergency situations.

Comment R-55: **An "aggrieved person" should be defined.**

Response: See responses to Comments C-6 and C-7.

Comment R-56: **An independent person should review petitions, not the Executive Director.**

Response: This suggestion contradicts a fundamental and critical role of the State Board and its chief staff person--to be an official appeal body via the petition process. Staff feels that the Commenter's alternative would result in an unnecessary expenditure of time and resources.

Comment R-57: **The existing three-day grace period should be put back into the proposed regulations to allow for the standard time necessary to receive notification by mail of a certification action before the start of the 30-day period to file a petition begins.**

Response: The language in question was removed to make the proposed process consistent with the standard water board petition process (23 CCR § 2050(a)).

Comment R-58: **Only those parties with demonstrated expertise in water quality should be on the list of interested parties in the petition.**

Response: One intent of the petition process as proposed is to hear from persons or entities that may approve or disapprove of a project and its potential water quality impacts. Please note that the language in question is identical to that process in place for other State and Regional Board programs (i.e., 23 CCR § 2050 et seq.).

Comment R-59: **Preparation of the staff record should be an internal procedure between the State and Regional Boards.**

Response: The Commenter appears to misunderstand the regulation language. The requirement is that a petitioner must only provide a copy of a request to the appropriate staff person. State and/or Regional Board staff will still prepare any copy of the record. This should not be a burden to the petitioner.

Comment R-60: **Change "§ 3867.1" to "§ 3868", and renumber the remaining sections accordingly.**

Response: Staff prefers not to implement this suggestion. The intention was to retain as many topics under their existing section numbers as possible.

Comment R-61: **Section 3867.1 should be revised to accommodate the independent reviewer process.**

Response: See response to Comment R-56.

Comment R-62: **A time limit for review of petitions for completeness by the State Board should be established in the proposed regulations.**

Response: The proposed language is modelled after the existing petition process in current regulations (23 CCR § 2051). Staff sees no justification for adding such a time restriction.

Comment R-63: **Subsection enumeration in section 3869 should be corrected.**

Response: The suggested correction has been made.

Comment R-64: **Revise subsection 3869(a)(4) to accommodate evaluation of petitions by an independent reviewer.**

Response: See response to Comment R-56.

COMMENTER S.

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Written Comments: June 7, 1999 FAX
6 pages (cover sheet mistakenly indicates 7 pages--6/11/99 check with T. Prabhu confirms 6)

Comment S-1: **The phrase "certifying agency" should be defined in proposed section 3831.**

Response: See response to Comment R-18.

Comment S-2: **The proposed regulations should define "discharge" according to a definition suggested by the Commenter.**

Response: This suggestion lacks merit. (See, also, response to Comment I-2.) The Commenter suggests that the regulations define "discharge" to mean "any addition of a pollutant from a point source into the waters of the United States," a definition the Commenter claims is consistent with the Clean Water Act definition.

However, the Clean Water Act defines both "discharge" and "discharge of a pollutant" (33 USC §§ 1362(12) and 1362(16)). The Commenter proposes that the regulations adopt as the definition of "discharge" the language used in the Clean Water Act to define "discharge of a pollutant." But "discharge" is the broader term and includes releases from point sources that do not involve the additional of pollutants to waters of the United States (*Oregon Natural Desert* v. *Dombeck* (9th Cir. 1998) 172 F.3d 1092, 1098, cert. denied (1999) 120 S.Ct. 397). Hydroelectric projects, in particular, are subject to water quality certification because they involve a "discharge," although they may not necessarily involve a "discharge of a pollutant." To define "discharge" more narrowly than the term is used in the Clean Water Act would create confusion and would make the regulations inconsistent with federal law.

Comment S-3: **The proposed regulations should define "emergency" according to CEQA.**

Response: Staff agrees that the CEQA definition may be appropriate, but feels that there is no need to include a definition for "emergency" in the proposed regulations at this time. (See also response to Comment G-1.)

Comment S-4: **An "aggrieved person" should be defined.**

Response: See responses to Comments C-6 and C-7.

Comment S-5: **The following revised language should be used in section 3831 and elsewhere in the proposed regulations:**

"water quality standards and other pertinent water quality requirements" and "appropriate provisions of federal and state water quality law".

Response: See responses to Comments C-1 and D-7.

Comment S-6: **The fee structure should not be based on the megawatt capacity of facilities because generation capacity has negligible correlation with certification processing time.**

Response: See response to comment K-3.

Comment S-7: **The term "costs" should be revised to read "reasonable costs."**

Response: Agreed. The proposed regulations referred to "reasonable costs" at one point (§ 3833(b)(1)(E)). Section 3833 has been amended to further emphasize "reasonable costs."

Comment S-8: **Section 3833 should be revised to distinguish separate fee structures for those activities not requiring a FERC license or license amendment, even where a FERC licensed facility may be involved.**

Response: Agreed. Fee schedules in subsections 3833(b)(2) (for discharges of dredged or fill material) or 3833(c) will apply.

Comment S-9:

1. **The incremental and maximum fees for certification of FERC licenses and license amendments proposed in subsections 3833(b)(1)-(2) should be reduced to fees consistent with the State Board's waste discharge fee program.**

2. **The proposed fees are excessive for the type of staff work involved.**

3. **The State Board should further justify that it has the legal authority to recover its costs.**

4. **The State Board should provide invoices detailing the costs incurred.**

Responses:

1. FERC licensed projects are exempt from WDRs, except in the highly unusual circumstance where there is a discharge of a pollutant subject to a NPDES permit associated with a hydroelectric project. Because the waste discharge program and the certification program have little or no overlap as applied to FERC licensed projects, there is no reason to use the same fee structure for both programs. Moreover, for activities subject to the waste discharge fee program, the state may regulate the activity, based on state law, even after the period for water quality certification has expired. In contrast, for FERC licensed projects, the State's regulatory authority is generally limited to certification authority, making it critical that the state act within the certification deadline. These considerations make it especially important for the State Board to ensure that the fee system provides adequate funding for certification decisions involving FERC licensed facilities.

2. See responses to Comments F-2 and K-2.

3. See response to Comment K-2.

4. Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

Comment S-10: **The State Board should delete proposed subsection 3833(b)(1)(C) in its entirety and amend subsection 3833(b)(1)(D) to refer to "a second deposit" instead of "subsequent deposits."**

Response: The implication of this comment is that the total fee that could be charged would be limited in size. For the reasons described in Comment K-2, the proposed fees are intended to recover the total actual costs of processing a certification application.

Comment S-11: **The State Board should revise proposed subsection 3833(b)(1)(E) to limit the applicant's total fee to $10,000.**

Response: See responses to Comments F-1 and K-2.

Comment S-12: **Language should be added to section 3833 to require the certifying agencies to maintain a record-keeping account of all expenditures incurred relative to the processing of the 401 certification.**

Response: Staff agrees that the State and Regional Boards should maintain an accounting system, but disagrees that such a requirement should be added to the regulations. See response to Comment E-1.

Comment S-13: **Some of the costs of processing the application for 401 certification should be borne by the General Fund.**

Response: See response to Comment K-2.

Comment S-14: **The proposed fee for non-hydroelectric-related projects that are to be waived should be $500.**

Response: See response to Comment A-2. The fee for "standard certification," the intended streamlined certification action, will indeed be $500.

Comment S-15: **Language referring to a fee for issuance of a waiver of WDRs should be removed from section 3833(b)(5) of the proposed regulations.**

Response: The intention of the proposed language was that applicants not be charged twice if a certifying agency was to issue both certification and WDRs. Staff did not intend to distinguish between WDRs and a waiver of WDRs, since waivers under the State program can be issued with conditions, and therefore may also require significant staff effort to develop. The Commenter correctly notes, however, that there may be rare instances when both regulatory actions are taken (i.e., a certification action and a waiver of WDRs), yet the agency may wish to charge the certification fee in order to be fairly compensated for staff time expended. The subsection in question has been revised to address this issue.

Comment S-16: **The maximum fee collected pursuant to proposed section 3833(c), fees for other certification lacking a specific fee structure, should be set at the standard $10,000 limit.**

Response: The suggestion is not supported by current law. The statutory maximum fee referred to actually applies only to WDRs--There is no statutory limit on certification fees, as long as the fee is "reasonable." Section 3833(c) is intended for non-standard types of certification, primarily non-water quality certification. While Staff does not believe that under most circumstances such actions might require more than 200 hours of staff time, it is possible. For these reasons Staff is hesitant to impose artificial limits to fees that will have little if anything to do with the water quality certification program.

Comment S-17: **Any additional information requested by a certifying agency should be limited specifically to water quality information.**

Response: The Clean Water Act requires that certifications address "any other appropriate requirement of State law." However, note changes made to subsection 3836(a) to bring it into better compliance with State law.

Comment S-18: **A certifying agency should have to justify its intent to deny an application for certification on water quality grounds (i.e., "with prejudice") at a public hearing.**

Response: The proposed language is adequate to satisfy public hearing requirements in federal and State law, and to provide an appropriate review process. The option for public hearing should appropriately remain an option.

Comment S-19: **Language in subsection 3856(h)(8) requiring a description of past and future projects related to the project or water body should be further qualified.**

Response: Staff does not see how these recommended changes will improve the requirement. Instead, they may block the acquisition of information necessary to assess potential individual and cumulative impacts to the watershed. (See also responses to Comments F-9, R-3, and R-8.)

Comment S-20: **As follow up to the proposed intention to allow certification of general classes of activities (section 3861 [proposed]), the certifying agency(cies) should certify any activity covered under Corps Nationwide Permits that do not require a Pre-Construction Notification.**

Response: The Commenter's suggestion is not an action that can or should be taken in the proposed regulations. (See also responses to Comments N-9 and R-11.)

Comment S-21: **In order to meet FERC-project needs, the State Board should be able to hold a petition in abeyance for up to two years for each successive abeyance agreement.**

Response: The language in question has been revised to eliminate the two-year limit, satisfying the comment.

Verbal Comments: June 8, 1999 Public Hearing
Commenter: David Kay

PH Comment S-22: **General support for the proposed regulations, and in particular for certification of classes of activities, is expressed.**

Response: Comment noted.

PH Comment S-23: **(Same as Comment S-2.) The proposed regulations should define "discharge" according to what the Commenter believes is the pertinent Clean Water Act definition.**

Response: See response to Comment I-2.

PH Comment S-24: **(Same as Comment S-3.) The proposed regulations should define "emergency" according to CEQA.**

Response: See responses to Comments G-1 and S-3.

PH Comment S-25: **The proposed fees and maximum fee in particular seem excessive.**

Response: See responses to comments F-2 and K-2.

PH Comment S-26: **(Same as Comment S-9(c)) The State Board should justify its authority to recover certain types of expenses by charging the proposed fees.**

Response: See response to Comment K-2.

PH Comment S-27: **(Same as Comment S-13.) Some of the costs of processing the application for 401 certification should be borne by the general fund.**

Response: See response to Comment K-2.

PH Comment S-28: **(Same as Comment S-18.) A certifying agency should have to justify its intent to deny an application for certification at public hearing.**

Response: See response to Comment S-18.

PH Comment S-29: **While the intent to allow certification of classes of activities is a "step in the right direction" these regulations need to be developed further.**

Response: In response to this and other comments, and after further consideration, Staff has modified section 3861 language appropriately. (See also responses to Comments J-2 and L-6.)

PH Comment S-30: **(Same as Comment S-20.) The State Board should reconsider blanket certification of Corps Nationwide Permits.**

Response: See response to Comment S-20.

COMMENTER T.

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Verbal Comments: June 8, 1999 Public Hearing

PH Comment T-1: **Concern that compensatory mitigation is now a requirement for water quality certification is expressed.**

Response: Staff foresees no particular problem with this language. The regulation would not require compensatory mitigation, but would require that it be reported if planned. This is necessary so that the State Board's water quality certification data base can be kept accurate and so that applicants can receive credit where credit is due. Note that mitigation in some form--i.e., avoidance, minimization, or compensation--must sometimes be expected if impacts, which by law must be reduced/eliminated, are to be avoided. (See also responses to related Comments D-4, L-3, R-3, and R-40.)

PH Comment T-2: **The Commenter is concerned with the requirement for a brief list and estimate of impacts from projects by the applicant that will affect the water body in question during the five years after a particular project.**

Response: Staff believes, contrary to the Commenter's opinion, that this requirement should be relatively easy for a water district or other large business or organization to fulfil. The applicants who are not expected and will not be required to meet this requirement are those that are planning only one project, or those who legitimately cannot be expected to plan projects ahead of time. Surely every water district has a operations and maintenance plan, including schedule? The certifying agencies would not expect an applicant to try to foresee specific emergencies. It is, however, reasonable to expect an assessment of scheduled activities that may cumulatively impact waters of the State. (See also responses to Comments F-9, R-3, and S-19.)

COMMENTER U.

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Written Comments: May 3, 1999 Letter
3 pages

Comment U-1: **Support for delegation of certification authority to the Regional Boards.**

Response: Comment noted.

Comment U-2: **Language concerning "incomplete applications" can be improved upon. Modified section 3835 language is provided.**

Response: Section 3835 has been revised to incorporate some of the recommended language. (See also, the revised section 3836.)

Comment U-3: **Please add the Commenter to the State Board's mailing list for future notices concerning these regulations.**

Response: Staff complied with this request.